NO. 80-547

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CHARLES E. WALLIN and
MADGE M. WALLIN,
Husband and Wife,
Petitioners,

v.

CITY OF PORT TOWNSEND and
PORT TOWNSEND LIBRARY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

CITATIONS TO APPENDIX

The Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for Jefferson County is attached hereto as Appendix A.

The judgment entered by the Superior Court of the State of Washington for Jefferson County is attached as Appendix B.

II.

COUNTERSTATEMENT OF THE CASE

Respondent must take issue with the manner in which petitioners have set forth their Statement of Facts. There is no indication in that statement that the trial judge found that petitioner's employment was terminated because of her refusal to follow lawful orders of the Library Board, her immediate superior. Further, that statement also neglects to mention that the trial court set out specifically in its findings certain insubordinate acts which justified the termination of petitioner's employment, and that petitioner was denied no constitutional right, nor was any action taken against her as punishment or retribution for involvement in any public causes or other matters unrelated to her performance as librarian.

In fact petitioner's own testimony: "I worked without conflict for 8-1/2 years

. . .", which was repeatedly stated at the trial, is evidence that through the great majoriy of her 11 year tenure even she did not claim any reprisal for her self-proclaimed civic activities. In fact, the record is clear that her conduct was such that several Library Board Members resigned because of her conduct and continual refusal to take orders. Several of those resigned members testified at this trial. They were not ambiguous in stating that petitioner became impossible to tolerate as an employee who was supposed to be answerable to the Board. Her own testimony discloses that petitioner refused to accept policy decisions of the Board and went her own way, until a Board was finally formed that put her on notice of her deficiencies and the performance expected of her, and terminated her employment when she refused to abide by orders or accept directions of her superiors. As the Court of Appeals of

the State of Washington said in its opinion: "The record amply supports the trial judge's findings".

The trial judge was most cognizant of the constitutional question in this case, and, in his closing remarks from the bench, stated: "I can find nothing to indicate that this discharge was for a valid exercise by the plaintiff or her husband of their constitutional rights". The judge further stated:

> The discharge cannot be made because of a valid exercise of First Amendment rights or other constitutional rights by the plaintiff, as is alleged here, however, exercise of those rights on a broad basis, such as appearing at a variety of public meetings as did the plaintiff and her husband, cannot serve as a cloak to prevent a discharge for other reasons such as disobedience to orders.

Clearly, the judge understood the law and petitioner's allegations. He found that the facts did not support those allegations.

Also omitted from petitioner's Statement of Facts is the information that immediately following her discharge she appeared before both the City Council and the Library Board, where both petitioners and others in their support were heard, and documentary objections were received. The laws of the State of Washington provided no requirement for a hearing under the facts of this case, but petitioners had a hearing in fact.

III.

ARGUMENT

A. Freedom of Speech

One is at a loss to argue the holdings of Perry V. Sinderman, 408 U.S. 593 (1972) and the cases therein cited. As pointed out above, the trial judge clearly understood the law, but he found, with ample reason, that the facts did not raise the legal issue. Madge Wallin was discharged

for insubordination and misconduct, and not as punishment for the exercise of any rights.

B. Procedural Due Process

There is no question that Madge Wallin's case was heard and reviewed at her instance after notice of her termination. No procedural guidelines existed, but the Library Board, by petitioner's admission, accepted petitions in her behalf, permitted her and her supporters to speak, and otherwise gave her every opportunity to present her case in a public forum. The Board was not pursuaded to change its mind. Due process does not require that the Board must reverse itself, Perry v. Sinderman, supra, does not so hold.

C. Burden of Proof

Petitioner, at each stage of this proceding, has urged that Elrod v. Burns, 427 U.S. 357 (1976) placed a burden of

proof upon respondent which was not carried. In fact, the trial court found specifically that just cause existed for the dismissal and that there was no infringement of her constitutional rights. It was not a finding that petitioners did not carry the burden of proof, it was that respondent's evidence established the facts, i.e., carried the burden.

Elrod v. Burns, supra, is a political patronage case, and has little if any application here. As Judge Stewart (concurring) said:

> The single substantial question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs . . .

The majority did apply a rule that an encroachment on First Amendment rights must "survive exacting scrutiny", which is exactly what happened here, although it

must be noted that it was found that there was no encroachment of First Amendment or other constitutional rights.

The state courts involved in this case follow a rule at least as demanding as Elrod v. Burns, i.e., Kinney v. Bauch, 23 Wn. App. 88, 596 P.2d 1074 (1979), which holds that when an employee has made a prima facie case of discrimination a city has the burden to rebut. In the case cited, evidence of incompetence, disloyalty and disruptive influence was sufficient to support a finding that an employee was not discharged in retaliation for exercise of a constitutionally protected right. The federal cases cited by petitioners were also presented to each of the State courts. Those courts, considering both federal and state law, found that the facts did not support any inference of an encroachment on petitioner's constitutional rights.

IV.

CONCLUSION

It is clear that petitioners are seeking a reversal of the factual determinations made by the trial court. Both levels of appellate review in the State of Washington deem those findings and the judgment to be "amply" supported by the record. There is no dispute of law. The petition should be denied.

Dated at Port Townsend, Washington, this 17th day of December, 1980.

Respectfully submitted,

GLENN ABRAHAM
Attorney for Respondents

APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

CHARLES E. WALLIN and MADGE M. WALLIN, husband and wife, Plaintiffs	)	NO. 9001
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
THE CITY OF PORT TOWNSEND and PORT TOWNSEND LIBRARY, Defendants	)	

This matter having been tried to the Court without a jury on December 12th and December 13th, 1978, the plaintiffs each appearing in person and by their attorney, Don Taylor of Fristoe, Taylor and Schultz, Ltd., P.S., the defendant appearing by its attorney, Glenn Abraham, and the testimony of the parties and the witnesses having been heard, the exhibits admitted and considered, and counsel having been heard, and the Court being fully advised, now makes the following

FINDINGS OF FACT

1. The plaintiffs are husband and wife, and the defendant is a municipal corporation existing and operating under the laws of the State of Washington, all parties are and were at all times material residents of the County of Jefferson, and the Court has jurisdiction of the parties and the subject matter.

2. Plaintiff Madge Wallin was employed by the defendant City of Port Townsend as a librarian from 1965 until June 11, 1976 when she was notified by the Library Board that her employment was terminated. She was paid through the month of June, 1976.

3. The reasons stated for the termination of employment were that the plaintiff librarian had failed and refused to obey lawful orders of the Board, particularly as they applied to the "weeding" of

the collection, release of library information to the press and public, absence from duty without permission and the disruption of library board meetings. These reasons were well-taken, and it is found that the plaintiff Madge Wallin did refuse to follow library board orders as to "weeding," release of library information, absence from her employment and the disruption of library board meetings.

4. It is found that the plaintiffs were not denied any constitutional right by the defendant, nor was any act taken against the plaintiffs as punishment or retribution for their involvement with public causes, governmental functions, or other matters not relating to the performance of the plaintiff wife as a librarian.

5. No statute nor ordinance has established the position of librarian as an officer of the City of Port Townsend.

6. It is found that the plaintiff, Madge Wallin, did obstruct the conduct of library board meetings, without cause, and did create distractions in said meetings by her conduct to the extent that productive activity could on many occasions not be carried on by the board because of her conduct.

7. It is further found that the library board did all that could reasonably be expected to assist the plaintiff Madge Wallin in correcting the deficiencies called to her attention by the board, and that she refused and resisted such assistance.

8. Plaintiff Madge Wallin had been on notice for more than two years prior to the termination of her employment that specific acts of hers were deemed grounds for dismissal by the library board, and of specific policies that the board required

her to carry out if she wished to continue in her position.

9. No further public hearing was required for the termination of plaintiff's employment, and she was extended full opportunity to present her objections and views as to the termination to the library board, to the City Council and to the public attending the meetings of the board and council.

10. No contract express or implied that prevented the termination of plaintiff's employment for cause existed.

11. Plaintiff was granted all of the pay, rights and privileges to which she was entitled by reason of her employment by the defendant.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The termination of the employment of Madge Wallin by the Port Townsend Library Board on or about June 11, 1976 was in all respects lawful and proper, and was done for good cause.

2. The Complaint of the plaintiffs shall be dismissed with prejudice.

Done in Open Court this 2nd day of February, 1979.

TYLER C. MOFFETT
Judge

Presented by:

s/
GLENN ABRAHAM
Attorney for Defendant

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

CHARLES E. WALLIN and MADGE M. WALLIN, husband and wife, Plaintiffs	)	NO. 9001
vs.	)	JUDGMENT
THE CITY OF PORT TOWNSEND and PORT TOWNSEND LIBRARY, Defendants	)	

This matter having come on for trial before the Court on December 12th and December 13th, 1978, plaintiffs appearing in person and by their attorney, Don Taylor of Fristoe, Taylor & Schultz, Ltd., P.S., the defendant appearing by its attorney, Glenn Abraham, and the Court, having heard the testimony and considered the evidence, and having entered herein its Findings of Fact and Conclusions of Law, and being fully advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED that the Complaint of the plaintiffs herein be and the same is hereby dismissed with prejudice.

Done in Open Court this 2nd day of February, 1979.

TYLER C. MOFFETT
Judge

Presented by:

s/GLENN ABRAHAM
Attorney for Defendant